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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 733

STEVE TANDARIC,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

TO THE UNITED STATES CIRCUIT COURT OF APPEALS. FOR THE SEVENTH CIRCUIT.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

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THE UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, the Chief Justice and Associated Justices of the Supreme Court of the United States.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

Your petitioner, STEVE TANDARIC, an alien, seeks a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit to review a judgment of that Court affirming a judgment of conviction in a criminal case by the District Court of the United States for the Northern District of Indiana, South Bend Division for violation of 8 U. S. C., 1940 ed., sec. 746 (a) (18), which is a part of the Nationality Act of 1940, and which makes it a felony punishable by fine and imprisonment for an alien to represent himself to be a citizen of the United States.

STATUTE UNDER WHICH JURISDICTION IS INVOKED.

This Court has jurisdiction to entertain this petition for a writ of certiorari under section 240 (a) of the Judicial Code as amended June 7, 1934. (28 U. S. C., 1940 ed., sec. 347 (a)). The judgment of the Circuit Court of Appeals was entered on November 17, 1945 (R. 65). On November 27, 1745, petitioner filed in said Court a petition for rehearing (R. 67), within the time prescribed by the rules of said Court, which petition for rehearing was denied on December 7, 1945 (R. 80). This petition for a writ of certiorari is filed in this Court within thirty days after the denial of the petition for rehearing as prescribed by Rule XI of the Rules of Criminal Procedure after Verdict of Guilt as amended on February 11, 1943 (18 U. S. C., 1940 ed., Sup. IV, following section 689), computed in accordance with Rule XIII of said Rules as amended March 17, 1941 (8 U. S. C., 1940 ed., following sec. 688).

STATEMENT OF BASIS FOR JURISDICTION.

Statute Involved.

Section 346 of the Nationality Act of 1940 (approved October 14, 1940, and in effect ninety days after the date of approval), 54 Stat. 1163 (8 U. S. C., 1940 ed., sec. 746), provides in part:

> "(a) It is hereby made a felony for any alien or other person, whether an applicant for naturalization or citizenship, or otherwise, and whether an employee of the Government of the United States or not—
>
> * * * * *
>
> "(18) Knowingly to falsely represent himself to be a citizen of the United States without having been naturalized or admitted to citizenship, or without otherwise being a citizen of the United States."
>
> * * * * *
>
> "(d) Any person violating any provision of subsection (a) of this section shall be fined not more than $5,000, or imprisoned not more than five years, or both."

The Indictment, the Proceedings and the Pertinent Jurisdictional Facts.

Petitioner was indicted in the District Court of the United States for the Northern District of Indiana, South Bend Division, on September 22, 1944. The indictments contains one count which charges that petitioner "on or about the 2d day of February, 1942, being then and there an alien, did then and there unlawfully, wilfully, knowingly and feloniously, falsely represent himself to Bendix Home Appliance Corporation, South Bend, Indiana, and to the

officials of the Bendix Home Appliance Corporation, to be a citizen of the United States" (R. 2). The indictment bears the following notation: "T. 8, Sec. 746 (a) (18)."

Petitioner moved to quash the indictment on the ground that the statute upon which it is founded is unconstitutional (R. 8), which motion was overruled (R. 8). Petitioner pleaded not guilty, and on the trial before a jury he moved for a directed verdict at the close of the Government's case and was overruled (R. 8-9, 26), and at the close of all the evidence he again moved for a directed verdict and was overruled (R. 9, 27). The jury returned a verdict of guilty (R. 27). Thereafter petitioner filed a motion for a new trial (R. 29-30), which motion was overruled on the ground that it was not filed in apt time, and also on its merits (R. 33). Petitioner was thereupon sentenced to imprisonment for a term of two years (R. 33).

Your petitioner is an alien. He was born in 1907 in Yugoslavia, which was then a part of Austria. He came to the United States in 1911 with his mother whose maiden name was Rebic (R. 16). Petitioner's father, John Tandaric, apparently came to the United States prior to 1911. Petitioner's father was never naturalized and petitioner was never naturalized. Petitioner's brother, Emil Tandaric, was born in the United States and died in the United States in 1917 (R. 16). Since arriving in the United States, petitioner resided in the vicinity of Hammond, Indiana (R. 13), and worked in the Industrial area of his home at his trade as a machinist.

Petitioner worked for the Standard Pullman Co., from 1925 to 1931 and from then to 1937 he was unemployed most of the time. No sooner would he get a job than he would be discharged. He was a member of the C.I.O., and was advised that it was necessary to change his name in order to procure employment. Previous to 1941 he held various jobs of short duration at the General American Tank Car Cor-

poration, Inland Steel Co., Union Carbide Co., and similar jobs at other industries (R. 26). At the time of the trial in March 1945, and for three years prior thereto, he was employed as a machinist by the Harbeson & Walker Co., in defense work (R. 26).

Petitioner began to work for the Bendix Corporation, according to one witness, about five months before November 1941 (R. 11), and according to another witness, he began to work for that corporation in July 1941, was temporarily laid off for a week in November of that year, and then worked there until February 16, 1942 (R. 15).

(The documentary evidence in this case consists of ten exhibits, numbered 1, 2, 3, 4, 5, 7, 8, 9, 10 and 11, all of which were introduced by the Government. Exhibits numbered 2, 3, 4, 5, 8, 9 and 10 were not contained in the printed transcript if the record in the Court below and are not contained in the printed record in this Court. By order of the Court below these seven original exhibits were considered by that Court without the same being printed (R. 52), and by a further order of that Court these seven original exhibits have been transmitted to this Court (R. 81). Exhibits 2, 3 and 4 are set out in the Appendix following the supporting brief, respectively as appendices A, A-1, B and C. Appendices A and A-1 are the two sides of a card and are reproduced in the exact size of the original.)

The oral evidence of the crime charged in the indictment consists of petitioner's admission on the trial that he is an alien (R. 27); the testimony of Steger, an agent of the Federal Bureau of Investigation, that petitioner admitted to him that "he had represented to Bendix that he was a citizen when he obtained employment in July 1941 and that later in February 1942," he represented "that he was born in Chicago, Illinois." (R. 12); the testimony of Chapman, a former assistant general manager of the Bendix

Corporation, that it was not the policy of that corporation to employ aliens, and that he interviewed petitioner when he first sought employment and that he then told him that he was a citizen (R. 15).

The documentary evidence of the crime charged in the indictment consists of four exhibits numbered 1, 2, 3 and 4. Exhibit 1 (R. 13-14) is an extrajudicial confession, and recites in part as follows:

> "About July 1941, I went to South Bend, Indiana and made application at the Bendix Home Appliance Corporation using the name of Robert Rebic and stated that I was born in Chicago, Illinois. I secured employment upon this representation and was employed there on the assembly line until March 1942. Approximately in February of 1942 I was fingerprinted in connection with the national defense program, still giving my name as Robert Rebic and stating that I was born in Chicago, Illinois. * * * I used the name of Robert Rebic and stated that I was a citizen of the United States in order to obtain employment."

To establish the corpus delicti by evidence independent of the confession, the Government introduced in evidence exhibits 2, 3 and 4 (Appendices A, A-1, B and C). The authentication of these exhibits consists of a statement that was introduced in the bill of exceptions and which recites that the evidence on the trial "connected and identified the defendant with" these and other exhibits (R. 60), and the testimony of Reinke who stated that he was employed as Personnel Director and Superintendent of Industrial Relations, and as such, he had charge of the records of Bendix Home Appliance Inc., and that exhibits 2, 3 and 4 produced by him "represented the employment record of the defendant." (R. 15) There is no evidence as to who prepared these records, or that petitioner was informed of the contents of exhibit 2, other than the seniority memor-

andum on the face thereof (Appendix A). The statement in the opinion of the Circuit Court of Appeals as to the preparation of this exhibit is untenable, as pointed out in the petition for rehearing (R. 72-73).

The only evidence corroborating the confession contained in exhibit 1 as to false statements made by petitioner to his employer in *July* 1941, and *February* 1942, are the recitations in exhibits 3 and 4 (Appendices B and C). These recitations are that petitioner was born in "Chicago," and "Ill." The decision of the Circuit Court of Appeals affirming the conviction can find no support in the evidence without holding that these statements were tantamount to a representation that petitioner was a citizen of the United States. And such a holding is in conflict with the views of this Court expressed in *Elk* v. *Wilkins*, 112 U. S. 94, 101-102, and with the decisions of Circuit Courts of Appeal in *Lam Mow* v. *Nagle*, 24 Fed. 2d 316, 318, and *Reynolds* v. *Haskins*, 8 Fed. 2d 473, 475.

The Government upon the introduction of evidence *in chief*, introduced the following testimony and documentary proof of offenses committed by petitioner several years prior to the offense charged in the indictment, and which were in no way connected with that offense:

1. That petitioner obtained a passport to Spain 1937 by false representations, and that he obtained a permit to reenter the United States by illegal means (Steger's testimony, R. 12). Petitioner's objections to this testimony were overruled (R. 12).

2. That in 1937 petitioner obtained a passport to Spain by using the birth certificate of his deceased brother Emil Tandaric, and that he obtained a permit to reenter the United States by illegal means (Waters' testimony, R. 16). Petitioner by his counsel objected to this testimony, moved to strike the same and to instruct the jury to dis-

regard the same, but his objection and his motions were overruled (R. 16).

3. Documentary evidence which showed that petitioner served in the armed forces of the Spanish Republic, as a member of the Lincoln Battalion of the International Brigade, and that he was thus engaged in influencing the political activities of a foreign government (R. 19-21, Exhibit 7, items 10, 11 and 15; Exhibit 10, item 37).

Petitioner, testifying in his own behalf, stated his name and address, his place of employment and the places where he had been employed since 1925; that he was born in Yugoslavia and came to the United States in 1911, and that he is an alien; that he is a member of the C.I.O., and that from 1931 to 1937 he had difficulty in securing employment and was advised to change his name. He further stated that he did not at any time represent to the Bendix Corporation or to any of its officials that he was a citizen of the United States (R. 26). On cross-examination he was directed, over his objections, to tell the jury "that he falsified his citizenship in order to go to Spain to fight on the Loyalist side in 1937," and that "he falsified use of his brother's name to obtain that passport," and "that he committed perjury in order to reenter the United States." (R. 27.)

The oral as well as the documentary evidence which the Government introduced in chief, as also upon cross-examination, of offenses committed by petitioner several years prior to the offense charged in the indictment and which had no connection with the offense for which he was being tried, was so unfair as to be a denial of due process. (*Boyd* v. *United States*, 142 U. S. 450, 458; *Johnson* v. *United States*, 318 U. S. 189, 195.) The introduction of that evidence was a departure from the accepted and usual course of procedure in criminal cases, and this departure has been sanctioned in this case by the Circuit Court of Appeals.

QUESTIONS PRESENTED.

A. Is the Statute valid?

I. Whether 8 U.S.C. 746 (a) (18) is so vague, indefinite and ambiguous as to be void under and repugnant to the due process clause of the Fifth Amendment.

II. Whether 8 U.S.C. 746 (a) (18) is void under and repugnant to the freedom of speech clause of the First Amendment.

III. Whether Congress was empowered to enact 8 U.S.C. 746 (a) (18) under the power granted by Article I, sec. 8, cl. 4 of the Constitution, "To establish a uniform rule of naturalization."

IV. Whether 8 U.S.C. 746 (a) (18) is void because it was not enacted under any power granted by the Constitution, and is in no way concerned with the alien's residence in this country.

B. What is the meaning of the Statute?

I. Whether the statute makes the false representation a criminal offense so long as it is made for a fraudulent purpose without regard to whether the wrongful act offends the laws of a State or the laws of the United States.

II. Whether the Statute permits conviction even though no fraudulent intent existed, so long as person making inquiry of the alien had some adequate reason for ascertaining his citizenship. What is such adequate reason?

III. Whether the Statute requires the misrepresentation to be material and knowledge by alien of such materiality.

C. Does the competent evidence sustain the conviction?

I. Whether there is any competent evidence tending to sustain the charge in the indictment that petitioner knowingly falsely represented his citizenship in February, 1942.

II. Whether there is any proof of the *corpus delicti* other than the purported extrajudicial admissions by petitioner.

D. Did the Trial Court seriously prejudice petitioner's rights and defense by erroneous rulings on evidence at the trial?

I. Whether there was prejudicial error in admitting evidence of other crimes or offenses, where such evidence was not relevant to any issue in the case and was not offered to prove intent or for the purpose of impeachment.

II. Whether there was prejudicial error in admitting documents where there was no proof that these documents were made by petitioner or at his instance or direction.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

1. There are here presented for decision the important questions of Federal law which have not been but should be settled by this Court, namely, the validity of 8 U.S.C. 746 (a) (18) under the First, Fifth and Tenth Amendments to the Constitution.

2. There is here presented for decision the important question of Federal law which has not been but should be settled by this Court, namely, the construction and interpretation of 8 U.S.C. 746 (a) (18). As a corollary to this reason it is also suggested that there is a conflict in the decisions of the several Circuit Courts of Appeal in construing this Statute as shown by

United States v. *Achtner*, 144 Fed. 2d 49, 52 (C.C.A. 2, 1944).

Prevost v. *United States*, 149 Fed. 2d 747, 748 (C.C.A. 9th, 1945).

United States v. *Frederick*, 50 Fed. Supp. 769, 772 (D.C. Tex. aff'd 146 Fed. 2d 488, C.C.A. 5th, 1945. Cert. denied 65 Sup. Ct. 866).

United States v. *Romberg*, 150 Fed. 2d 116 (C.C.A. 2d, 1945).

3. There is a conflict between the decision by the Circuit Court of Appeals for the Seventh Circuit in the case at bar and the decision in *Prevost* v. *United States*, 149 Fed. 2d 747 (C.C.A. 9, 1945) with regard to the ruling concerning admissibility of documents. This question of procedure is peculiar to trials of aliens since almost invariably the Government relies in part on documents similar to those involved in the case at bar.

4. The Circuit Court of Appeals in affirming the con-

viction sanctioned the trial court's rulings in admitting hearsay documents, and evidence of other crimes. These rulings seriously prejudiced petitioner's rights. The jury found petitioner guilty where there was no competent evidence to sustain the charge laid in the indictment. Exercise of this Court's power of supervision is necessary to avoid harsh injustice to petitioner and to guide all Federal trial courts in future analogous cases.

5. This case involves a question of gravity and general importance to all aliens in this country. Problems involving aliens present issues that must be decided by this Court on the basis of the broadest policies of national welfare, and not to visit "hardship on an alien for slight or insubstantial reasons." (*Bridges* v. *Wixon*, 65 Sup. Ct. 1443, 1446, 1449), and not on the basis of a local policy, as one which has been characterized as a "witch hunt" in *Frederick* v. *United States*, 146 Fed. 2d 488 (C.C.A. 5, 1944).

In the light of past post-war assaults on the economic and political rights and privileges of aliens, the instant decision is a source of potential danger to all aliens. The administration of this section of the Nationality Act should be based upon and guided by an authoritative and precise decision by this Court of last resort. The boundaries of that section of the Nationality Act should be fixed by this Court so that injustice to aliens will be avoided.

6. The punishment in this case is harsh and infamous (*Mackin* v. *United States*, 117 U. S. 348, 352), and is imposed on petitioner on the sole charge that he *told a lie*. The charge does not involve moral turpitude, or evil intent or purpose. It is unknown how many aliens have been goaded by economic necessity to run afoul of the challenged provision of the statute, but it is known that the number of aliens who have been denied employment during the War period was so large that our former At-

torney General Francis Biddle on December 27, 1941, was moved to make a public statement in which he said that the barring of aliens from employment is an economic waste and stupid error (New York Times, Dec. 28, 1941, p. 4). And a week later, our late President Franklin D. Roosevelt said in a public statement. "I am deeply concerned over the increasing number of reports of employers discharging workers who happen to be aliens." (New York Times, Jan. 3, 1942, p. 32.) It is of vital importance to many aliens, and to the enforcers of the Nationality Act of 1940, that the challenged provision of this Act be construed by this Court so that the enforcement thereof shall not operate to subject aliens to criminal prosecution, deportation, and denial of naturalization, for the commission of an act the criminal nature of which is not free from grave doubt.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the Circuit Court of Appeals for the Seventh Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and the proceedings of the Circuit Court of Appeals for the Seventh Circuit in the case docketed therein as No. 8817, and entitled The United States of America, *Plaintiff-appellee vs.* Steve Tandaric, *Defendant-appellant,* to the end that this cause may be reviewed and determined by this Court, as provided by the Statutes of the United States; that the judgment of said Circuit Court of Appeals be reversed by this Court; and that petitioner may have such further relief as this Court may deem proper.

STEVE TANDARIC,
Petitioner,

By HAROLD J. FINDER,
Counsel for Petitioner.

IN THE

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OCTOBER TERM 1945.

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STEVE TANDARIC,

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vs.

UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINION OF THE COURT.

The opinion of the Court below has not yet been officially reported. It is shown in the printed record at pages 61-65.

Grounds of Jurisdiction.

The preceding petition at pages 2-6 contains a statement of the grounds on which the jurisdiction of this Court is invoked. To avoid repetition reference is made thereto.

Statement of the Case.

The statement made in preceding Petition at pages 1-6, is here adopted and made a part of this brief. The facts and issues therein stated will be elaborated in the argument only to the extent found necessary and helpful in the argument, *infra.*

ERRORS ASSIGNED AND URGED.

The Circuit Court of Appeals erred:

1. In holding that 8 U. S. C. 746 (a) (18) is not repugnant to the due process clause of the Fifth Amendment to the Constitution.

2. In holding that 8 U. S. C. 746 (a) (18) does not abridge the freedom of speech guaranteed by the First Amendment to the Constitution.

3. In holding that 8 U. S. C. 746 (a) (18) is not in contravention of the Tenth Amendment to the Constitution as an enactment beyond the powers granted to Congress.

4. In holding that the Federal Government may punish an alien by fine and imprisonment under a law which was not enacted under any of the powers granted by the Constitution, and which does not involve the right or want of right of such alien to reside in this country.

5. In failing to construe 8 U. S. C. 746 (a) (18) so as to require the alien making a false statement of citizenship to have knowledge that such statement was material.

6. In holding that there was competent evidence that petitioner had represented himself to be a citizen of the United States, particularly in view of the fact that the Circuit Court of Appeals failed to limit the proof to the crime charged in the indictment and failed to rule that the document from which it quoted (exhibit 2, Appendix A-1), was *res inter alios acta* as to petitioner, and utter hearsay.

7. In sanctioning a departure by the trial Court from the accepted and usual course of judicial proceedings in the following respects:

(a) In permitting the Government to introduce

evidence, oral and documentary, in chief, as also on cross-examination, of other offenses, which were not relevant to any issue in this case.

(b) In overruling petitioner's motions for a directed verdict.

8. In departing from the accepted and usual course of judicial proceedings in the following respects:

(a) In ignoring or overlooking the fact that the Government introduced evidence of other offenses not only on cross-examination of petitioner, but on the introduction of evidence in chief.

(b) In making the unsupportable finding that Chapman prepared Exhibit 2, and the further finding that he was then told by petitioner that he is a citizen of the United States.

SUMMARY OF ARGUMENT.

I.

Invalidity of 8 U. S. C. 746 (a) (18).

A. The challenged provision of the statute is repugnant to the due process clause of the Fifth Amendment because it is ambiguous, vague and uncertain, and men of common intelligence must speculate as to its meaning.

B. This provision is repugnant to the guaranty of free speech in the First Amendment in that it makes the mere telling of a lie a criminal offense.

C. This provision is repugnant to the Tenth Amendment because Congress in the enactment thereof exceeded the power granted by Article 1, section 8, clause 4 of the Constitution "To establish a uniform rule of naturalization."

II.

Interpretation and meaning of 8 U. S. C. 746 (a) (18).

The legislative history of the Nationality Act of 1940 sheds little light on the object and the scope of the challenged provision. The several decisions of Circuit Courts of Appeal construing this provision are in conflict each with the other, and with applicable decisions of this Court. Without a decision of this Court, the construction and the constitutionality of this provision is not free from grave doubt.

III.

The Circuit Court of Appeals has sanctioned a departure by the Trial Court from the accepted and usual course of judicial proceedings in the reception of evidence of other offenses, which were not relevant to any issue in this case.

IV.

There is a total absence of competent evidence that petitioner committed the crime charged in the indictment.

A. There was no competent evidence, either oral or documentary, of the *corpus delicti*, independent of the purported extrajudicial confessions or admissions.

B. A statement by a person that he was born in Chicago or in Illinois, is not a representation that he is a citizen of the United States.

ARGUMENT.

I.

Invalidity of 8 U. S. C. 746 (a) (18).

A. The challenged provision of the statute is repugnant to the due process clause of the Fifth Amendment because it is ambiguous, vague and uncertain, and men of common intelligence must speculate as to its meaning.

This provision is too vague and ambiguous to inform resident aliens what conduct on their part will constitute a criminal offense punishable by fine and imprisonment. Under the literal terms of the challenged provision of the statute an alien is subject to fine and imprisonment for falsely representing himself to be a citizen of the United States whether or not he made the representation with intent to defraud, and without regard to the occasion on which it was made. The Statute does not concern itself with the reasons prompting any person to make inquiry of the alien.

The exertions of the several Circuit Courts of Appeal to render that provision constitutional by filling the *holes* in it by constructions that are strained and conflicting only point up petitioner's contention that the provision is so ambiguous and indefinite as to be repugnant to the due process clause of the Fifth Amendment.

In *United States* v. *Achtner*, 144 Fed. 2d 49, 52 (C.C.A. 2d, opinion by Circuit Judge Clarke), the Court in holding that this provision is not assailable on constitutional grounds, construed the prohibited false representation as more than a mere untruth, but one that is made with a

"fraudulent intent." The Court there said that so severe a penalty was not intended for words spoken "to stop the prying ears of some busybody."

In *United States* v. *Romberg*, 150 Fed. 2d 116 (C.C.A. 2d, opinion by Circuit Judge Frank), the Court construed the prohibited false representation to be a criminal offense if made to any person who has some "adequate reason" for making the inquiry of the alien. No test is given for determining the nature of the *adequate reason*. The construction in the *Achtner* case that the false statement must be made with fraudulent intent is by implication rejected. In the *Achtner* case the question whether the false statement is a criminal offense is determinable by the motive or purpose of the alien. In the *Romberg* case the question is determinable by the motive or purpose of the person making the inquiry.

In *Prevost* v. *United States*, 149 Fed. 2d 747, 748 (C.C.A. 9th), the Court rejects the *fraudulent intent* and *adequate reason* theories, and holds that under the language of the challenged provision, the false representation need not be a material one.

In the case at bar the Government took the position that, "The present statute does not require proof of a fraudulent purpose in making the false statement as to citizenship." (R. 71.)

And in the case at bar the Circuit Court of Appeals cites with approval *both* the *Achtner* case and the *Romberg* case without recognizing the inconsistency of so doing.

Petitioner respectfully submits that the several interpretations by the various Circuit Courts of Appeal *after* a set of facts is presented to the Court for decision indicates that the legislation in question fails to inform resident aliens what conduct on their part will constitute a criminal

offense punishable by fine and imprisonment. A statute which forbids the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.

Connally v. *General Construction Co.* 269 U. S. 385, 391.

United States v. *Cohen Grocery Co.* 255 U. S. 81, 87-88.

The ambiguity and vagueness on the face of the statute rendering it void under the due process clause of the Fifth Amendment cannot be cured by a judicial construction which seeks to specify "details of the offense intended to be charged." The specification of details, writes into the statute what is not there. A construction by such a method is in conflict with the decision of this Court in *Lanzetta* v. *New Jersey,* 306 U. S. 451, 453.

B. The challenged provision is repugnant to the guaranty of free speech in the First Amendment in that it makes the mere telling of a lie a criminal offense.

Under a literal construction of this provision, the act which it prohibits is punishable by fine and imprisonment without regard to whether or not it offends any law, either State or Federal, and even though it be utterly harmless. (See limitation of police power and authorities at pages 71-72 of the Record.) This provision, by its broad language, subjects an alien to fine and imprisonment for making a false statement, regardless of the purpose thereof, or of the person to whom it was made, or the occasion on which it was made. A law making such an act punishable as a criminal offense is incompatible with the freedom of speech which is guaranteed to all persons by the First Amendment. The right of free speech is not a privilege to speak only

the truth, but equally, untruth, provided no law is violated, and no person is injured, in the exercise thereof. To hold otherwise, would be to sanction censorship, which is utterly incompatible with the concept of freedom of speech and of the press. (2 Cooley's Constitutional Limitations, 8th ed., 1927, p. 886.)

"The term 'person,' used in the 5th Amendment," said Mr. Justice Field in a separate opinion in *Wong Wing* v. *United States,* 163 U. S. 228, 242, "is broad enough to include any and every human being within the jurisdiction of the republic." And see *Bridges* v. *California,* 314 U. S. 252, 263, note 6. The provisions of the First and Fifth Amendments acknowledge no distinction between citizens and resident aliens. They extend their inalienable privileges to all persons and guard against any encroachment of those rights by federal or state authority. (*Bridges* v. *Wixon,* 65 S. Ct., Rep. 1443, 1456.)

C. The challenged provision is repugnant to the Tenth Amendment, for the reason that Congress in enacting it exceeded the power granted by Article I, section 8, clause 4 for the constitution, "To establish a uniform rule of naturalization."

In the *United States* v. *Achtner,* 144 Fed. 2d 49, 51-52, the Court held that this provision is not unconstitutional, on the following theories:

1. The provision is in the nature of a regulation, and "Congress has ample power to impose a regulation of this kind upon the conduct of aliens in this country."
2. The Nationality Act of 1940 was enacted "as a national defense measure in the face of impending war to tighten the control over the conduct of aliens."
3. The word falsely in the challenged provision suggests more than a mere untruth, and includes the meaning with intent to defraud.

4. The challenged provision is valid because it is "a part of the Nationality Act of 1940."

The decision in the *Achtner* case, and the theories upon which it rests, are in conflict with principles of law that have been firmly established by this Court. The statement in that case that the challenged provision is in the nature of a regulation, and "Congress has ample power to impose a regulation of this kind upon the conduct of aliens in this country," is not supported by the decisions in *United States ex rel. Vollpe* v. *Smith,* 289 U. S., 422, 425, or *Turner* v. *Williams,* 194 U. S. 279, cited in the *Achtner* opinion. This Court held in these cases that the United States can, as a matter of public policy, by congressional enactment, forbid aliens or classes of aliens from coming within its borders, and expel aliens or classes of aliens from its territory, and may take them into temporary custody to effect their expulsion. There is no suggestion in these cases that the constitutionality of a law that renders resident aliens liable to fine and imprisonment, and one that has for its object the exclusion or expulsion of aliens, are determinable by the same test. In testing the validity of the challenged provision of the statute, we are not concerned with a law prescribing what conduct on the part of resident aliens shall be cause for expelling them from the United States, but with a criminal law that exposes them to penalties. The principles that are applicable to the one are not applicable to the other.

The power to exclude aliens or expel resident aliens from this country is inherent in the United States as a sovereign nation, and in the exercise thereof, Congress may enact appropriate legislation to exclude or expel such aliens or classes of aliens whom Congress may deem undesirable (*Fong Yue Ting* v. *United States,* 149 U. S. 698, 705), but

a power to exclude or expel does not confer authority to enact a law that has for its object the imposition of punishment by fine and imprisonment of resident aliens. (*Wong Wing* v. *United States*, 163 U. S. 228, 237, 242.)

The rule is unalterable that a federal law can be enacted only in the exercise of power granted by the Constitution. That rule is unaffected by the motive that impelled the enactment of such law. The fact that the Nationality Act of 1940 was enacted at a time of impending war will not render valid a provision thereof that runs counter to the Constitution. The war was impending is true, but that fact has no bearing on the question here under consideration. The Act was not passed in the exercise of power to declare war or provide for national defense, but under the power "to establish a uniform rule of naturalization," granted to Congress by the 4th Clause of Section 8 of Article I of the Constitution. If the enactment of the challenged provision is outside the scope of that power in times of national calm, a national crisis will not place it within that scope. The imminence of war did not enlarge the constitutional power of Congress.

United States v. *Cohen Grocery Co.*, 255 U. S. 81, 87-88.

Schechter Corp. v. *United States*, 295 U. S. 495, 528.

Congress is without power to enact a law subjecting resident aliens to punishment by fine and imprisonment for misconduct that does not transgress the Naturalization law or any other Federal law. Punishment for such misconduct can only be imposed by State action, not by Federal action (*House* v. *Mayes*, 219 U. S. 270, 282; *Linder* v. *United States*, 268 U. S. 5, 17; 2 Cooley's Constitutional Limitations (8th ed., 1927), p. 1232).

II.

Interpretation and Meaning of 8 U. S. C. 746 (a) (18).

The construction of the challenged provision is inextricably linked with the constitutionality thereof. So far, no court has held that it was the congressional intent that this provision shall be construed literally. Such a construction would be subject to imprisonment an alien who, to avoid embarrassment, said that he was a citizen of the United States in reply to a casual inquiry by a stranger with whom he happened to be talking at some public place, as, for example, a hotel lobby. It is doubtful whether such a literal construction was intended by Congress. And the decisions of the Circuit Courts of Appeal which give this provision a non-literal construction are in conflict each with the other. (See Brief I, pp. 20-25, *supra.*)

The legislative history of the Act casts little light on the Congressional intent with regard to this provision. Generally, Congress regarded the *entire* Nationality Act of 1940 as dealing with the subjects of "citizenship, naturalization and expatriation."

> Senate Report No. 2150 (76th Cong. 3d Sess.; Sept. 23, 1940), p. 3.
>
> House Report No. 2396 (76th Cong. 3d Sess.; June 5, 1940), p. 1.
>
> 86 Cong. Rec. 11939 (the debate in the House).

It is highly improbable that Congress believed that the *alien* presented a potential danger to the security and welfare of our country. Statistics show that no cause for such fear existed. See "Employment of Aliens and Plant Protection" (published by National Industrial Conference Board, 247 Park Ave., N. Y.), pointing out at page 4 that "citizenship alone does not insure loyalty. It is a person's

political and social philosophy, not his birthplace, that makes him either a constructive member of American society or a potential or actual saboteur working for the destruction of democratic institutions." The varying and conflicting constructions of this provision by the several Circuit Courts of Appeal leave the mind in doubt as to the congressional intent. This doubt cannot be removed without a decision by this Court construing this provision.

III.

The Circuit Court of Appeals has sanctioned a departure by the trial court from the accepted and usual course of judicial proceedings in the reception of evidence of other offenses, which were not relevant to any issue in this case.

The testimony of Steger that petitioner represented himself to be a citizen of the United States when he applied for employment at the Studebaker plant, the South Bend Lathe Co. plant, and the Dodge plant (R. 12), and that he obtained a passport to Spain and a reentry permit by illegal means (R. 12), and the testimony of Waters that petitioner admitted to him that in 1937 he obtained a passport to Spain by using the birth certificate of his deceased brother, Emil Tandaric, and that he obtained a permit to reenter the United States by illegal means, deprived petitioner of the right to have an unprejudiced jury pass on competent and unprejudicial evidence and determine fairly from such evidence whether or not petitioner was guilty of the specific crime charged in the indictment.

These witnesses testified upon the introduction by the Government of *evidence in chief*. Their testimony was not received for the purpose of impeachment, but as a part of the Government's case. In each of these instances, peti-

tioner's counsel objected to the testimony and was overruled (R. 12, 16). And his counsel's motion that the jury be instructed to disregard that testimony was overruled (R. 16).

It was likewise prejudicial and unjustifiable to permit the prosecution to introduce in evidence exhibit 7 which recites that petitioner was in the military or naval service of a foreign government, as a member of the Lincoln Battalion of the International Brigade, and that he was arrested in 1933 for resisting an eviction, and in 1934 for assault (R. 21, items 10, 11, 14 and 15). And there was no legal sanction for introducing in evidence exhibit 10 which recites at page 4 that petitioner was a member of an organization that was engaged in influencing the political activities of a foreign government, and that he was arrested for resisting an officer and for assault; or for introducing in evidence exhibit 11 (R. 24), which purports to show that petitioner registered at a Local Selective Service Board as Robert Rebic, and stated he was born in Chicago, Illinois. These exhibits were not offered or introduced as impeaching evidence, but as evidence *in chief*.

That evidence of offenses other than the one charged in the indictment is inadmissible against the accused, is a rule that has been firmly established by this Court and by the highest courts in other jurisdictions.

Boyd v. *United States*, 142 U. S. 450, 458.
Johnson v. *United States*, 318 U. S. 189, 195.
3 Wharton's Criminal Evidence (11th ed., 1935), p. 2213.
8 Ruling Case Law, pp. 198-199.

On cross-examination, petitioner was ordered, over his objections, to answer questions which required him to tell the jury that in 1937 he went to Spain with a passport which he obtained by illegal means, "to fight on the Loyal-

ist side'' (R. 27). The introduction of that evidence violated not only the rules of cross-examination and the rule against the introduction of evidence of other offenses, but was calculated to prejudice the jury against the petitioner on *political* grounds. It is well known that all who gave aid to the Loyalists were subjected for years to a relentless campaign of vituperation and calumny in the press and by radio. The Lincoln Battalion was a special target of that campaign. The probable effect thereof on the feelings of the jurors, or some of them, toward the petitioner is not hard to see. The sole charge in the indictment was that petitioner secured employment by falsely representing himself to be a citizen of the United States. His guilt or innocence of that charge was not dependent on his activity in the Spanish conflict. The evidence that was thus admitted was not relevant to any issue in this case. To what extent the prejudicial evidence influenced the jury cannot be known, but that it is reversible error admits of no doubt.

The rulings on evidence of other offenses was sanctioned in the instant case by the Circuit Court of Appeals (R. 64). These rulings are in conflict with the applicable decisions of this Court in *Boyd* v. *United States,* 142 U. S. 450, 458 and *Johnson* v. *United States,* 318 U. S. 189, 195.

IV.

There is a total absence of competent evidence that petitioner committed the crime charged in the indictment.

A. There was no competent evidence, either oral or documentary, of the corpus delicti, independent of the purported extrajudicial confessions or admissions.

The oral testimony, independent of petitioner's admis-

sions on the trial, is the following: Chapman testified that he interviewed petitioner "when he *first sought employment* and that the defendant told him he was a citizen" (R. 15).

We do not know how many times and how frequently petitioner sought employment, nor when he first sought employment. We do know that he had been seeking employment not only a number of times at the Bendix plant, but also at the Studebaker plant, the South Bend Lathe Co. plant, the Dodge plant (R. 12). There is no evidence that the *first* time he sought employment was subsequent to January 14, 1941, when the Nationality Act of 1940 went into effect. Reinke testified "that he conferred with Steve Tandaric (R. 15), with reference to Exhibit 4" (Appendix C). Manifestly the oral evidence was not sufficient to submit the case to the jury.

The documentary evidence consists of exhibit 1 (R. 13-14), and exhibits 2, 3 and 4 (Appendices A, A-1, B, and C). Exhibit 1 in an admission or confession obtained by Steger, an agent of the Federal Bureau of Investigation. The recitations in this document are related only to statements contained in exhibits 3 and 4, and will be considered later.

Exhibit 2 is a card, a facsimile of which is shown in the appendix hereto, as appendices A and A-1. The face of this exhibit (Appendix A) bears the following memorandum: "I have seen the seniority list and the names of those men hired before me. And I have no relatives. Bob Rebic." There is not an iota of evidence that the recitations on the reverse side of this card were written by the petitioner or that he even saw these recitations before the trial. The trial Court's ruling admitting this document (as also exhibits 3 and 4) is based entirely on the following authentication. Harold Reinke, formerly a Personnel Di-

rector and Superintendent of Industrial Relations of the Bendix Corporation stated that in his capacity as such director,

> "he had charge of the records of the Bendix Home Appliance, Inc.," and that exhibits 2, 3, 4 and 5 "represented the employment record of the defendant, Steve Tandaric, in his custody, and so identified the exhibits * * *." (R. 15.)

The following statement appears in the bill of exceptions:

> "The evidence introduced at the trial by the United States connected and identified the defendant with Government's exhibits 1, 2, 3, 4, 7, 8, 9, 10 and 11." (R. 60.)

There is no dispute in regard to the fact that the names Bob Rebic and Steve Tandaric are the names of petitioner, and that petitioner went under the name of Bob Rebic when he worked for the Bendix Corporation, and that he appears on the records of that corporation under the name of Bob Rebic. He had in fact changed his name Bob Rebic several years before he was given employment by the Bendix Corporation (R. 26). The only thing that is important is the fact that exhibit 2 is an office record that was apparently prepared by a clerk of the Bendix Corporation, not by petitioner. There is not even any evidence that the name Bob Rebic on the face of this card was written by petitioner. But if it had appeared from the evidence that he signed the *seniority memorandum* on the face of this card, there would yet be a total absence of proof that he even read or saw the reverse side thereof. If he signed the memorandum, he obviously did it when the card was handed to him by a clerk for the purpose of recording his seniority rating, and immediately taken from him and placed in the files of the corporation. (See *Prevost* v. *United States,* 149 Fed. 2d, 747, 749, C. C. A. 9th, 1945.)

In the opinion of the Circuit Court of Appeals it is stated that,

> "Chapman, formerly general manager of Bendix, testified that he conferred with defendant in the preparation of exhibith 2 (factory employment application in which defendant was asked 'are you a U. S. citizen?' and to which he answered 'Yes.'" (R. 63.)

This statement is wholly incorrect, as pointed out in the petition for rehearing (R. 72-73). The petition for rehearing was denied without correction of this erroneous statement.

The recitations in the confession or admission (Exhibit 1, R. 13-14) as to false statements made by petitioner in July 1941 and February 1942, refer to statements contained in exhibits 3 and 4 (Appendices B and C). These recitations are that petitioner was born in "Chicago" and "Ill."

Assuming for the present that there is evidence that these exhibits are his writings, it cannot be said that he did thereby "falsely represented himself to be a citizen of the United States." One may be born in the United States and yet not be a citizen thereof at birth, and he may be a citizen of the United States at birth and cease to be a citizen thereof at a later time, as by expatriation. The Fourteenth Amendment provides that, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

Section 601 of Title 8 U. S. C., 1940 ed., declares as follows: "The following shall be nationals and citizens of the United States at birth: (a) A person born in the United States and subject to the jurisdiction thereof."

The prerequisite to citizenship of a person at birth is that he shall then be "subject to the jurisdiction of the United States."

Not all persons born in the United States are citizens thereof at birth. In *Lam Mow* v. *Nagle,* 24 Fed. 2d 316, 318, the Court quoted the following from the opinion written by Mr. Justice Story in *Inglis* v. *Sailors Snug Harbor,* 3 Pet. (28 U. S.) 99:

> "Two things usually concur to create citizenship: First, birth locally within the dominions of the sovereign; and secondly, birth within the protection and obedience, or, in other words, within the ligeance of the sovereign. That is, the party must be born within a place where the sovereign is, at the time, in full possession and exercise of his power, and the party must also, at his birth, derive protection from, and consequently owe obedience or allegiance to, the sovereign, as such de facto."

See also,

Duncan v. *United States,* 68 Fed. 2d 136, 143.
Reynolds v. *Haskins,* 8 Fed. 2d 473, 475.
Louie Lit v. *United States,* 238 Fed. 75, 76.
Stadtler [*Maranek*] v. *School District,* 71 Minn. 311, 317-318, 73 N. W. 956, 959.

In *Elk* v. *Wilkins,* 112 U. S. 94, this Court speaking through Mr. Justice Gray, says at page 101-102:

> "The persons declared [by the Fourteenth Amendment] to be citizens are 'all persons born or naturalized in the United States, and subject to the jurisdiction thereof.' The evident meaning of these last words is, not merely subject in some respect or degree to the jurisdiction of the United States, but completely subject to their political jurisdiction, and owing them direct and immediate allegiance. And the words relate to the time of birth in the one case, as they do to the time of naturalizat n in the other. Persons not thus subject to the jurisdiction of the United States at the time of birth cannot become so afterwards, except by being naturalized."

The question now under consideration is discussed in an elaborate opinion in *United States* v. *Wong Kim Ark,* 169 U. S. 649. At page 692 the Court speaks of Scotch parents who are *domiciled* in the United States, and at page 693, of *resident aliens,* while *domiciled* here, and at page 705, of Chinese parents who have a *permanent domicile* in the United States. The meaning of the phrase, *subject to the jurisdiction* of the United States is there discussed at length at pages 693, 694, and 724-725.

It is therefore clear that there is no evidence in this case to prove the corpus delicti. In the absence of such evidence, the purported admission contained in exhibit 1 (R. 13-14), and in the testimony of Steger, an agent of the Federal Bureau of Investigation, were not admissible in evidence. While that exhibit and the testimony of that witness had no probative value in law, they carried weight with the jury and were highly prejudicial. (*Sprinkle* v. *United States,* 150 Fed. 56, 59.)

In 2 Wharton's Criminal Evidence (11th ed., 1935), sec. 640, p. 1069, the author says: "It is practically universally held that the corpus delicti of a crime cannot be proved by an extrajudicial confession standing alone, but must be proven independently of it." An extrajudicial confession does not justify a conviction when the corpus delicti has not been shown otherwise. (Underhill on Criminal Evidence (3d ed., 1923), sec. 241, p. 345.) To the same effect, *Gulotta* v. *United States,* 113 Fed. 2d 683, 685-687.

The submission of a case to a jury in the absence of competent evidence to prove the specific crime charged in the indictment, whether the accused be a citizen or an alien, is a departure from the accepted and usual course of judicial proceedings. The Circuit Court of Appeals has in this

case "so far sanctioned such departure by a lower court, as to call for an exercise of this Court's power of supervision." (Sec. 5 (b) of Rule 38 of the Revised Rules of this Court.)

Conclusion.

It is respectfully submitted that the vital questions presented by the 18th subdivision of 8 U. S. C. 746 (a) with respect to the construction and the constitutionality thereof, ought to be settled by this Court. So, too, the questions presented by the departure by the trial Court from the accepted course of judicial proceedings and the sanctioning thereof by the Circuit Court of Appeals for the Seventh Circuit, call for the exercise of this Court's power of supervision.

It is respectfully submitted that the writ of certiorari prayed for in the petition ought to be granted.

Respectfully submitted,

HAROLD J. FINDER,
Counsel for Petitioner.

APPENDIX

Face of Government Exhibit 2.

Write in this Space Three References and Their Addresses

MISS JEAN LIPSKI
221 W. Washington Ave
So. Bend

MR. SAM TARPOFF
6116 Columbia Ave.
Hammond Ind.

MR. SAMUAL L DAVIS
824 LINDSEY
SO. BEND IND.

Govt Ex 2

Do you have any relatives working at Bendix Home Appliances, Inc.? No

If so, give name or names

LEAVE THIS SPACE BLANK

Michael Vayda. 190 1/2 W Colfax

I have seen the seniority list and the names of those men hired before me and I have no relatives. Bob Vance

Reproduced exact size

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APPENDIX A. 1.

Reverse Side of Government Exhibit 2.

FACTORY EMPLOYMENT APPLICATION
BENDIX HOME APPLIANCES, INC.

O.K. O.K. JB

This card will be ignored unless filled out completely. Answer All Questions.

NAME BOB REBIC Social Security No. 316-18-6532

ADDRESS 221 W. WASHINGTON AVE. PHONE ✓

How Long in South Bend 4 MTHS. Are you U.S. Citizen YES What Descent AMERICAN Where Born CHICAGO, ILL.

Married Yes Single Dependents NONE Ages of Children

EDUCATION	Public School	Yrs.	Perochial School	Yrs.	High School	Yrs.	College	Yrs.
	7							

Last Place of Employment FARMING-(FARM MACHINE REPAIR WORK) How Long 10 YRS. Why Did You Leave QUIT

Address R.D. #2 WADSWORTH, OHIO = MR. MIKE MAROVIC

Occupation GENERAL FARM HAND Hourly Rate WEEKLY

Employed previously by SAM TARPOFF How Long 1921 TO 1931 Why Did You Leave NO BUSINESS

Address 6116 COLUMBIA AVE HAMMOND IND.

Occupation BARBER Hourly Rate $10.00 WK. COMM. AND

To what Fraternal, Religious, or other Organizations do you belong? NONE

(Arc-welding)

Age 37

Height 5'11"

Weight 180

Color WHITE

Sex MALE

Do You have a Trade? YES Name of Trade BARBER-FARMER How Long Worked at It 20 YRS

Do You Stay at Home NO Board and Room YES Rent Buying Home Own Home

Have You Had Specialized Training of Any Kind NOT SPECIALIZED

SOME ARC WELDING

Work Desired PRODUCTION WORK Date 5/4/41

APPENDIX B.

Government Exhibit 3.

BENDIX HOME APPLIANCES, INC.

INFORMATION RECORD.

Dept..... Clk. No..... Date 7/2/41 Occupation.....
....

GENERAL DATA:

1. Name Bob Rebic. 2. Age 37.
3. Address: 2211 W. Washington. 4. Telephone.....

Previous Occupations: Dates:

A. ..... From..... to.....
B. ..... From..... to.....
C. ..... From..... to.....

5. Single or Married Married. 6. Birthplace Chicago.
7. Vaccination Date Childhood. 8. Serious Illnesses No.
9. Severe Injuries No. 10. Surgical Operations No.
11. Physical Defects or Impairments None.
12. Present Health Good.

Remarks: Mazzini—Neg. 7-3-41.
(In Longhand) BOB REBIC.

PHYSICAL FINDINGS:

1. Height and Weight 5'9" 171¾.
2. Pulse—Rate 96 Rhythm Reg.
3. Temperature 99.
4. Eyes .....
   Dist. vision—R..... L..... (w.g.) R..... L.....
   Near vision—R..... L..... (w.g.) R..... L.....
   Color Sense .....
5. Ears .....
   Hearing—R..... L.....
6. Nose .....

7. Mouth .....
8. Throat .....
9. Lungs .....
10. Heart .....
11. Blood vessels .....
12. Nervous system .....
13. Abdomen and Groins .....
14. Genitals .....
15. Skin .....
16. Glands .....
17. Spine and Joints .....
18. Extremities .....
19. Blood pressure—Syst. 130. Diast. 80.
20. Urine—React.....Sp. gr.....Alb. Neg. Sugar Neg.

Remarks .....

CLASSIFICATION:

Class A ☒ Class B ☐ Class C ☐ Class D ☐

Remarks .....

.....
Attending Nurse.

C. SELBY,
Examining Physician.

("O.K." written in longhand across face of above exhibit.)

APPENDIX C.

Government Exhibit 4.

BENDIX HOME APPLIANCES, INC.

INFORMATION RECORD.

Dept..... Clk. No..... Date 2/16/42 Occupation.....

GENERAL DATA:

1. Name Bob Rebic. 2. Age 38.
3. Address: 2211 W. Washington. 4. Telephone.....

Previous Occupations: Dates:

A. ..... From..... to.....
B. ..... From..... to.....
C. ..... From..... to.....

5. Single or Married M. 6. Birthplace Ill.
7. Vaccination Date 1918. 8. Serious Illnesses No.
9. Severe Injuries No. 10. Surgical Operations No.
11. Physical Defects or Impairments No.
12. Present Health Good.

Remarks: Mazzini—Neg. 2-16-42.
(In Longhand) BOB REBIC.

PHYSICAL FINDINGS:

1. Height and Weight 5'9½" 180.
2. Pulse—Rate 84 Rhythm Reg.
3. Temperature 99.
4. Eyes .....
   Dist. vision—R..... L..... (w.g.) R..... L.....
   Near vision—R..... L..... (w.g.) R..... L.....
   Color Sense .....
5. Ears .....
   Hearing—R..... L.....
6. Nose .....

7. Mouth .....
8. Throat .....
9. Lungs .....
10. Heart .....
11. Blood vessels .....
12. Nervous system .....
13. Abdomen and Groins .....
14. Genitals .....
15. Skin .....
16. Glands .....
17. Spine and Joints .....
18. Extremities .....
19. Blood pressure—Syst. 130. Diast. 80.
20. Urine—React.....Sp. gr..... Alb. Neg. Sugar Neg.

Remarks .....

CLASSIFICATION:

Class A ☒ Class B ☐ Class C ☐ Class D ☐

Remarks .....

.....
Attending Nurse.

C. SELBY,
Examining Physician.

("O.K." written in longhand across face of above exhibit.)

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682053—46

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 733

STEVE TANDARIC, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 61–65) is reported at 152 F. 2d 3.

JURISDICTION

The judgment of the circuit court of appeals was entered November 17, 1945 (R. 65), and a petition for rehearing was denied December 7, 1945 (R. 80). The petition for a writ of certiorari was filed January 11, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII

of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether the provision of the Nationality Act of 1940 making it a felony for any alien knowingly to falsely represent himself to be a citizen, is invalid under the First, Fifth, or Tenth Amendments.

2. Whether the trial court erred in admitting evidence of other similar offenses.

3. Whether there was any competent evidence of the corpus delicti aside from petitioner's extra-judicial admissions.

STATUTE INVOLVED

Title I, subch. III, § 346 of the Nationality Act of 1940, 54 Stat. 1163 (8 U. S. C. 746), provides in part:

> (a) It is hereby made a felony for any alien or other person, whether an applicant for naturalization or citizenship, or otherwise, and whether an employee of the Government of the United States or not—
>
> * * * * *
>
> (18) Knowingly to falsely represent himself to be a citizen of the United States without having been naturalized or admitted to citizenship, or without otherwise being a citizen of the United States.
>
> * * * * *
>
> (d) Any person violating any provision of subsection (a) of this section shall be

fined not more than $5,000, or imprisoned not more than five years, or both.

STATEMENT

On September 22, 1944, petitioner was indicted in the District Court for the Northern District of Indiana for violation of the Nationality Act of 1940 (8 U. S. C. 746 (a) (18)). The indictment charged that "on or about the 2nd day of February, 1942, being then and there an alien, [he] did then and there unlawfully, wilfully, knowingly and feloniously, falsely represent himself to Bendix Home Appliance Corporation, South Bend, Indiana, and to the officials [thereof], to be a citizen of the United States without * * * having been naturalized or admitted to citizenship, or without * * * otherwise being a citizen of the United States" (R. 1–2). After a trial by jury petitioner was found guilty (R. 27), and he was sentenced to imprisonment for two years (R. 33). The Circuit Court of Appeals for the Seventh Circuit affirmed the conviction (R. 61–65).

The facts, so far as pertinent, may be summarized as follows:

Petitioner is an alien (R. 27). He was born in Yugoslavia, and came to the United States in 1911 at the age of four, but has never been naturalized (R. 16–21, 27). He filed an employment application with the Bendix company in May 1941 (R. 15; Pet. 37–38). He was hired in July

1941, was temporarily laid off for a week in November, and then worked there until February 16, 1942 (R. 15). During January and February 1942, the Bendix company "was engaged exclusively in work under contracts emanating from the government of the United States" (R. 60).

Chapman, formerly an official of the company, testified that it was the company's policy not to employ aliens; that "he interviewed the defendant when he first sought employment and that the defendant told him he was a citizen and that he put the OK mark in the corner of Exhibit 2 and approved his employment"; that if petitioner had said he was an alien, there would have been further investigation (R. 15). Government Exhibit 2,[1] to which Chapman referred, is an employment application form taken from the company's files (R. 15). It is made out in the name of "Bob Rebic," which alias petitioner used while working for Bendix (R. 11, 26–27). Among the questions printed on the form is, "Are you a U. S. citizen"; the written answer is "Yes." In the upper left-hand corner is written "OK." In the space provided for the date is written "5/4/41." (Pet. 38.)

[1] Government Exhibits 2, 3, and 4 are printed as appendices to the petition (Pet. 37–42). Exhibits 1, 7, and 11 are printed in the record (R. 13–14, 19–21, 24–25). The original exhibits 2, 3, 4, 5, 8, 9, and 10 have been filed separately with the Clerk of this Court (R. 81).

Exhibits 3 and 4 are also taken from the company's file and are part of petitioner's employment record (R. 15). They record the results of physical examinations. Exhibit 3 (Pet. 39–40) is dated "7/2/41" and gives petitioner's birthplace as Chicago. Exhibit 4 (Pet. 41–42) is dated "2/16/42" and gives his birthplace as Illinois. Reinke, personnel director of the company, testified that he conferred with petitioner with reference to Exhibit 4 (R. 15).

On August 16, 1944, petitioner was interviewed by two agents of the Federal Bureau of Investigation and in their presence (R. 11–13) signed a statement in which he admitted that "about July of 1941" he made application for employment at the Bendix company, using the name of Robert Rebic and giving Chicago, Illinois, as his birthplace. "I used the name of Robert Rebic and stated that I was a citizen of the United States in order to obtain employment at Bendix. I used the name of Rebic because I knew that if my past employment difficulties in the vicinity of Hammond, Indiana, plus the fact that I was an alien were known to the company I would not have been given employment." "I secured employment upon this representation." He also admitted that he used the name Rebic and gave Chicago as his birthplace when he was fingerprinted in February 1942 in connection with the national defense program. (R. 13–14.)

The Government introduced evidence of similar offenses committed by petitioner. He had falsely claimed citizenship in obtaining a passport to go to Spain in 1937 and in obtaining a reentry permit on his return (R. 12, 16). He had also represented that he was a citizen in applying for work at several other plants in northern Indiana (R. 12). To prove that petitioner is an alien, the Government introduced his "Alien Registration Form," in which he stated that he had served with the Abraham Lincoln Battalion in Spain in 1937 and 1938, and that he had been arrested on charges of assault and resisting eviction, though in both cases it appeared that he was not convicted (R. 17–21).

Petitioner, taking the stand in his own behalf, testified that he was unemployed most of the time from 1931 to 1937 and that "no sooner would he get a job than he would be discharged"; that he was a member of the CIO and that he changed his name upon advice in order to procure employment; that he had never represented to the Bendix company that he was a citizen. On cross-examination he admitted that he had applied for work at Bendix under the name of Rebic to conceal his identity; that the statement that he was born in Illinois was false; that he had falsified his citizenship in order to go to Spain to fight on the Loyalist side in 1937; and that he committed perjury in order to reenter the United States. (R. 26–27.)

ARGUMENT

1. We submit that petitioner's attack upon the constitutionality of the statute is not such as to warrant the allowance of the petition.

(a) Petitioner contends (Pet. 9, 11, 16, 18, 20–22) that the language of the particular section of the Nationality Act (8 U. S. C. 746 (a) (18)) is so ambiguous and vague as to be in violation of the due process clause of the Fifth Amendment; that a resident alien cannot tell whether he will be punished for any misrepresentation of citizenship, or only when made with intent to defraud; that this is shown by the decisions of the Circuit Courts of Appeals in *United States* v. *Romberg*, 150 F. 2d 116 (C. C. A. 2), *United States* v. *Achtner*, 144 F. 2d 49 (C. C. A. 2), and *Prevost* v. *United States*, 149 F. 2d 747 (C. C. A. 9). We submit, however, that there is no conflict between the *Achtner* and the *Romberg* decisions, for both hold that the misrepresentation, to be criminal, must be made to one who has "some * * * adequate reason for ascertaining * * * defendant's citizenship."[2] In both cases the test laid down is whether the misrepresentation was knowingly made to someone who

[2] This holding is based upon the reasoning that "the word 'falsely,' particularly in a criminal statute, suggests something more than a mere untruth and includes 'perfidiously' or 'treacherously,' * * * or 'with intent to defraud.'" *United States* v. *Achtner*, 144 F. 2d at 52. Cf. *Screws* v. *United States*, 325 U. S. 91, 101–103.

had a right to know the truth. It is true that the *Prevost* decision seems to differ in that it holds that the materiality of the misrepresentation is not an issue under the statute. But this does not avail petitioner because under either interpretation he would be guilty. Whatever doubts there may be as to the permissible scope of the statute's application, it was clearly intended to cover a false representation in response to "a legitimate inquiry on the part of an employer at a time of deepening national crisis." *United States* v. *Achtner*, 144 F. 2d at 52.

The Nationality Act of 1940, codifying and strengthening the existing laws pertaining to naturalization and citizenship, had been in course of preparation for a number of years, but it was called up specially in September 1940 and passed with a minimum of debate because it was felt that it would strengthen the hand of the Government against "fifth columnists." 86 Cong. Rec. 11939–11965, particularly pp. 11940, 11943, 11947. The section here involved is particularly adapted to this purpose and, as interpreted by the Second Circuit in the *Achtner* and *Romberg* cases, it sets up a standard of conduct which is sufficiently definite. This is not such a case as *Lanzetta* v. *New Jersey*, 306 U. S. 451, cited by petitioner, in which the state court sought to cure the vagueness of the word "gang" by specifying details of the offense intended to be charged. In this statute, as the Second Circuit showed in

United States v. *Achtner*, 144 F. 2d at 52, the word "falsely" has in the context a special meaning which provides a sufficient standard. Cf. *Connally* v. *General Construction Co.*, 269 U. S. 385, 391–392.

In the circumstances presented here, we submit that there is no occasion for this Court to undertake to delineate the precise limits of the statute's application. It is true that the *Prevost* case seems to apply a more literal interpretation than the *Achtner* and *Romberg* cases, but in all the reported cases which have arisen, the facts show that the representation of citizenship was made to one who had a right to the truth.[3] Petitioner's situation is the same. He admits that he pretended to be Robert Rebic, a citizen, in applying at the Bendix company, and that he would not have obtained his position if it had been known that he was an alien (R. 13–14). Under these circumstances, his conduct in remaining with

[3] In the *Achtner* case, the representation was made to an employer in October 1941 "at a time of deepening national crisis." In the *Romberg* case, it was made to an official of the defendant's union investigating charges of inefficient work against the defendant which might have led to an accusation of sabotage. In the *Prevost* case, there were representations to a draft board, and to an employer in May 1942; the circuit court of appeals reversed the conviction on a point of evidence. In *United States* v. *Frederick*, 50 F. Supp. 769 (S. D. Tex.), affirmed, 146 F. 2d 488 (C. C. A. 5), certiorari denied, 324 U. S. 861, the representation was made to an election official; the only question on appeal was the sufficiency of the evidence.

the company through February 1942 amounted to a continuous representation of citizenship. Furthermore, he admits that in February 1942 he was fingerprinted in connection with the national defense program and that he still gave the name of Rebic and stated he was born in Chicago, Illinois (R. 14). This constituted a fresh representation of citizenship and plainly was made to one who had a right to know the truth.

(b) Petitioner asserts (Pet. 9, 11, 16, 18, 22–23) that the challenged provision is repugnant to the guarantee of freedom of speech contained in the First Amendment in that it makes the mere telling of a lie a criminal offense. But it is not the mere telling of a lie which is forbidden. As we have seen, it is the misrepresentation of citizenship to one who has the right to a truthful answer which is the gist of the offense. Consequently, petitioner's conviction is no more a violation of his right to free speech than would be his conviction on a charge of perjury.

(c) Petitioner also contends (Pet. 9, 11, 16, 18, 23–25) that the section in question is in violation of the Tenth Amendment in that it exceeds the powers granted to Congress. The argument is that the only relevant grant of power to Congress is "To establish an uniform rule of naturalization," and that, while the federal government has power to exclude and expel aliens, the power to punish a resident alien by fine and imprison-

ment rests with the states alone. Petitioner seems to think that the federal government, after it has admitted an alien, has no more authority over him than it has over a citizen, until he does some act which makes him liable to expulsion. It is true that the resident alien becomes subject to the police power of the states, and the states may even legislate for aliens as a class so long as there is no unjust discrimination. Cf. *Hines* v. *Davidowitz*, 312 U. S. 52, 76. But this Court pointed out in the *Hines* case, in holding that Congress, by adoption of the comprehensive, integrated Alien Registration Act, had precluded action in the same field by the State of Pennsylvania, that the power of the federal government to make "regulations touching the rights, privileges, obligations or burdens of aliens as such" is supreme (p. 63). The Court also said (p. 66), "And specialized regulation of the conduct of an alien before naturalization is a matter which Congress must consider in discharging its constitutional duty 'To establish an Uniform Rule of Naturalization * * *.'" Clearly the present statute, being a regulation of the conduct of aliens as such, was within the power of Congress to prescribe.[4]

[4] Petitioner cites *Wong Wing* v. *United States*, 163 U. S. 228, to the effect that Congress may exclude or expel aliens but may not punish them by fine or imprisonment. But the actual holding was that, while aliens may be excluded or expelled or subjected to temporary detention by summary proc-

2. Petitioner contends that there was error in the admission of evidence of other offenses (Pet. 10, 12, 16–17, 27–29). There was evidence that petitioner had knowingly made false claims of citizenship at other plants in order to obtain employment and that he had obtained a passport to Spain and a reentry permit by similar means (R. 12, 16). Since the Government had to prove that he had acted knowingly in the present case, all this evidence was admissible under the familiar rule that similar offenses may be shown to prove intent. 2 Wigmore, *Evidence* (3 ed., 1940), secs. 304–305; *Weiss* v. *United States*, 122 F. 2d 675, 682–688 (C. C. A. 5), certiorari denied, 314 U. S. 687.

Petitioner also complains (Pet. 28) because Government Exhibits 7 and 10[5] contain statements that he served in Spain as a member of the Abraham Lincoln Battalion and had been arrested twice. The two exhibits do not contain evidence of crime. Exhibit 7 shows on its face that neither arrest resulted in conviction (R. 21). Petitioner, while objecting to the exhibits as a whole, does not

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ess, they may not be subjected to punishment by fine or imprisonment for violation of the immigation laws unless the right to trial by jury has been accorded them. 163 U. S. at 237.

[5] Exhibit 7 (R. 19–21) is a form which petitioner filled out under his proper name in compliance with the requirements of the Alien Registration Act. Exhibit 10 is a form which petitioner, again in his proper name, filled out for his draft board giving details as to his status as an alien.

seem to have made any specific objection to the parts of which he now complains (R. 17, 23). Had he done so those parts might have been concealed from the jury's view. The exhibits were admissible to show that petitioner was in fact an alien, and there is no showing that anything contained in them was prejudicial to him. Exhibit 11 (R. 24–25), of which petitioner also complains (Pet. 28), is a draft registration card issued to "Robert Rebic" in February 1942. It was clearly relevant and admissible to show petitioner's intent to conceal his true identity at the Bendix plant (R. 14).

In that part of the record which recites petitioner's cross-examination, there appears a reference to his having "falsified his citizenship in order to go to Spain to fight on the Loyalist side in 1937" (R. 27). Petitioner complains (Pet. 28–29) that this reference was calculated to prejudice the jury on political grounds, because it is "well known" that the members of the Abraham Lincoln Battalion were the objects of much abuse. However, we think it may be said with equal propriety that it is also well known that they were accorded as much, if not greater, praise, and there is nothing here to indicate that the jury was influenced one way or the other. Furthermore, the evidence had already come into the case as a part of two relevant exhibits.[6] Since the matter was already before the jury, this slight reference

[6] Exhibits 7 and 10.

on cross-examination can hardly have been prejudicial to petitioner in view of the overwhelming evidence of his guilt. Finally, it may be noted that it is impossible to be certain from the record whether the phrase "to fight on the Loyalist side" was a part of the government attorney's question or was a gratuitous addition by petitioner in answer to the attorney's question as to when and under what circumstances he went to Spain.

3. Petitioner's final contention is that there is no evidence, aside from his admissions to the F. B. I., that he committed the offense charged (Pet. 10, 16, 19, 29–35). His supporting argument is as follows: The only witness who directly testified to the offense was Chapman (R. 15), who said that petitioner told him he was a citizen "when he first sought employment," and petitioner argues that there is no evidence that this first visit to the plant was subsequent to the effective date of the Nationality Act;[7] next he contends that his employment application,[8] which was dated subsequent to that date, was inadmissible as hearsay, since there was no evidence that he had ever seen its contents; finally, he asserts that the only other evidence of the offense is to be found in the statements in Exhibits 3 and 4 (Pet. 39–42) that he was born in Chicago, Illinois, and he argues that the mere statement that a person was born in

[7] January 14, 1941.

[8] Exhibit 2 (Pet. 37–38).

the United States does not constitute a claim of citizenship.

The independent proof necessary to corroborate a confession need not be such as to establish the corpus delicti in itself. "Any corroborating circumstances will serve which in the judge's opinion go to fortify the truth of the confession. Independently they need not establish the truth of the corpus delicti at all, neither beyond a reasonable doubt nor by a preponderance of proof." *Daeche* v. *United States*, 250 Fed. 566, 571 (C. C. A. 2).[9] We think the independent proof here was more than sufficient to meet the requirements of this rule and would have been enough in itself to establish the offense.

Exhibit 2, petitioner's application for employment, was properly admitted under the federal shop book rule.[10] It is dated "5/4/41," and contains the printed question, "Are you a U. S. citizen," and the written answer, "Yes." Chapman testified that he marked this application "O. K." and approved petitioner's employment after pe-

[9] See also *Warszower* v. *United States*, 312 U. S. 342, 345–348; *United States* v. *DiOrio*, 150 F. 2d 938 (C. C. A. 3), certiorari denied November 19, 1945, No. 502, this Term.

[10] Act of June 20, 1936, 49 Stat. 1561 (28 U. S. C. 695). *Palmer* v. *Hoffman*, 318 U. S.109; *New York Life Ins. Co.* v. *Taylor*, 147 F. 2d 297 (App. D. C.); *Coplin* v. *United States*, 88 F. 2d 652, 667–668 (C. C. A. 9), certiorari denied, 301 U. S. 703. Reinke, who had charge of the Bendix records, properly identified Exhibits 2, 3, 4, and 5 as the employment record of petitioner (R. 15).

titioner had told him that he was a citizen. We submit that there is no justification in the record for petitioner's claim that he had applied "a number of times at the Bendix plant" [11] (Pet. 30), and that the application, together with Chapman's testimony, constitutes sufficient proof that on May 5, 1941, petitioner represented to Bendix that he was a citizen.

Finally, even if the original statement to Chapman had been prior to the effective date of the Act, petitioner would be in no better position. The proof is clear that at some time he did represent to Chapman that he was a citizen. Thereafter, conscious that he would not have been hired if it had been known that he was an alien (R. 14), he accepted employment in July 1941, stated in connection with physical examinations in July 1941 and February 1942 that he was born in Illinois (Pet. 39, 41), and made the same statement when fingerprinted in connection with the national defense program in February 1942 (R. 12, 14). It is true that in themselves such statements do not amount to a claim of citizenship. But where they are intended to be so understood by the parties to whom they are made in the light of the prior false claim, and where they are parts of a scheme to maintain the representation, we think

[11] Reinke testified that Exhibits 2, 3, 4, and 5 "represented the employment record of the defendant, Steve Tandaric" (R. 15).

it clear that they come equally under the condemnation of the Act.

CONCLUSION

The decision of the circuit court of appeals is correct, and there is no conflict of decisions or important question of law presented by the facts of this case. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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